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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 858

JAMES BASS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

Your petitioner, James Bass, respectfully prays this court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, to review a Judgment of that Court entered in the above entitled cause being No. 17,257 (Criminal) on the 22nd day of January, 1964, which appears in the Appendix as Exhibit "B".

OPINIONS AND JUDGMENTS BELOW.

The initial judgment in this case was the judgment of the United States District Court (3) for the Eastern District of Missouri, Eastern Division, wherein the Court

sentenced the petitioner, defendant, to be committed to the custody of the Attorney General of the United States for a period of three years entered on the 25th day of January, 1963, following a verdict of "guilty" returned by a jury, which appears in the Appendix as Exhibit "A".

A timely Appeal was filed to the United States Court of Appeals for the Eighth Circuit and upon the filing of briefs and after hearing arguments, the said court entered its decision and opinion on the 22nd day of January, 1964, which Opinion is found in the Appendix as Exhibit "C" beginning on page 13 and ending on page 23.

It is this decision and opinion which the petitioner prays to have reviewed and set aside.

GROUNDS FOR INVOKING JURISDICTION.

The jurisdiction of this court is invoked under Section 1254 (1), Title 28, United States Code.

(a) The Court of Appeals for the Eighth Circuit has herein rendered a decision in conflict with the decisions of other United States Courts of Appeals on the same matters; and

(b) Has decided an important question of Federal law which has not been, but should be settled by this court; and

(c) Has so far sanctioned such a departure by a lower Court from the usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

On these reasons as more fully amplified below your petitioner grounds his prayer for the Writ of Certiorari.

STATUTES CONFERRING JURISDICTION TO REVIEW.

§ 1254. Courts of appeals; certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree—§ 1254 (1), Title 28, United States Code.

STATUTE INVOLVED IN CASE.

Title 26, § 4744. **Unlawful Possession.**

(a) Persons in general.—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4741 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741 (a).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(1) Can the Statutory presumption of guilt as provided in Section 4744 (a). Title 26, U. S. C., serve as grounds to convict a person not in actual possession of a narcotic drug where there is no proof that the person in actual

continuous possession did not pay the required tax or have the form required by Section 4741 (a), Title 26, U. S. C.

(2) Is it competent to prove by circumstantial evidence, possession of a narcotic drug in one person, when the direct undisputed proof shows continuous possession in another person.

(3) Is a defendant deprived of a fair trial where he is restricted in his cross-examination and is not permitted to cross-examine government agents regarding their dealings with, and the whereabouts of a person proven by direct proof by Government witnesses to have been in actual continuous possession of a narcotic drug when the government contends that the defendant was in unlawful possession of the same drug, based on circumstantial evidence.

(4) Was the evidence sufficient to convict the defendant of the charge of unlawful possession of a narcotic drug.

STATEMENT OF THE CASE.

Facts.

James Smokhouse, a Treasury Agent, having previously purchased narcotics from one Robert Vaughn, went to an apartment at 5963 Oakhurst Place, St. Louis, Missouri, with other Agents, and arrested Vaughn and arranged to have Vaughn call someone, identified as the defendant, to purchase a pound of "reefer". The person told Vaughn to come for it, Vaughn said no; the person said it would take twenty minutes to get there. At Sarah Street and St. Louis Avenue in St. Louis, the defendant boarded a taxi driven by one Clarence Butts, got into the rear seat and asked to be taken to 5963 Oakhurst Place. He first told Butts to wait, but later said to go on, saying, "Maybe they didn't show up," then when the taxi passed

an alley, the defendant told Butts to make a "U" turn and wait at the mouth of the alley where one Vernell Booker got into the front seat with a brown bag which he placed between himself and the driver in the front seat. The taxi then drove on and was hailed by a girl who asked to be taken to an address in St. Louis, and she also sat in the rear seat of the taxi. There is no other conversation of the defendant reported with any of the passengers. The cab arrived near 5963 Oakhurst and the defendant without any package alighted from the cab and went into the apartment building where the Agent with Vaughn emerged. The defendant talked to both of them and Vaughn alone and said he had not brought "it". The Agent asked the defendant for some "weed" and was told by the defendant that he had none, but he would be back in half an hour and he started to enter the cab, when the defendant was arrested by another Agent in the area, and the brown bag in the seat between Booker and the driver Butts, was removed by an agent and after analysis was found to contain about ½ pound of marihuana. Booker was not arrested and was not asked for the purchase form required by Sec. 4742, Title 26, U. S. C., but the defendant while on the way to the police station was asked if he had such a form and he replied "No". The defendant was the only one charged with possession of the narcotic, although no person saw him in actual possession of it at any time. A jury found the defendant guilty of being a transferee, not having paid the tax.

REASONS FOR ALLOWANCE OF THE WRIT.

(a) The decision and opinion of the Court of Appeals for the Eighth Circuit is in conflict with the decision of the Court of Appeals for the Fifth Circuit and is in conflict with the decision of the Court of Appeals for the

Seventh Circuit on the same matter involved in this case and this appeal.

The Court of Appeals for the Fifth Circuit in the case of **Perez v. United States, 297 F. 2d 12,** had before it the precise question involved in the case at bar. In the Perez case there were two counts, one charging "Smuggling" and the other charging "Possession" of marihuana. In that case there were two persons in an automobile coming from Mexico, when they were arrested and marihuana was found under the front seat. Only one man was asked if he had the required order form, the other was not asked. In our case at bar, the Eighth Circuit Court of Appeals in its opinion says:

> "The defendant cites **Perez v. United States, 297 F. 2d,** which was reversed because of an error in the instructions."

This is not accurate and our opinion is in conflict with the opinion and judgment of the Court of Appeals for the Fifth Circuit, which in the Perez case, supra, said:

> (1) Under the rules which have been established in this class of cases, we do not think it can be said as a matter of law that the evidence did **not** establish a sufficient basis for the jury to find appellants guilty as to the count charging **SMUGGLING.**"

But as to the "Possession" Count the court said:

> (3, 4) The conviction of the offense alleged in the second count was clearly not supported by evidence, and the judgment of the trial court as to that count must be reversed. . . ."

The faulty Instruction found in the Perez case was related to the "Smuggling" count, but not as to the "Possession" count. As to the "Possession" count the court reversed the judgment OUTRIGHT because of the

failure to establish the absence of the order for, in the case of both the persons in the auto. This is directly opposed to the opinion in the case at bar, and the conflict between the two courts should be resolved by the Supreme Court.

The opinion in the case at bar is in direct conflict with the opinion and decision of the Court of Appeals for the Seventh Circuit on the same set of similar facts. In fact, in our opinion the Court of Appeals for the Eighth Circuit says:

> "The statement in **United States v. Landry, 257 F. 2d 425**, that 'But no court, so far as we are aware, has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person' is an inaccurate statement."

In our case in order to justify the conviction of the defendant and the failure to arrest or convict Booker (who had continuous actual possession) the Court must do exactly what the Court in Landry says no court has done, that is, move the possession out of the one having actual possession into someone else by circumstantial evidence. This is not a question of joint control in the case of two persons being jointly charged with the possession. These two cases, ours at bar and the Landry case of the Seventh Circuit, are directly opposed to each other as to the critical point of decision in both cases. The Supreme Court should resolve this conflict by accepting Certiorari and review the opinion in our case.

(b) The Court of Appeals for the Eighth Circuit has in this case attempted to decide an important question of federal law which has not been, but which should be settled by the United States Supreme Court. That is the question as to whether a presumption of guilt can be fixed upon one

person when a violation or guilt is not established as to the only person in actual possession. But the court does not make a very clear concise decision. The Opinion conflicts with itself and merely assumes matters not in evidence at all.

In one place the court says:

> "There is strong evidence that the defendant **either** controlled Mr. Booker or that the defendant and Mr. Booker were in joint control over the marihuana." l. c. 4 (top paragraph).

In another place the opinion states:

> "The appellant's second contention is that Booker had actual possession of the marihuana and that the Government never proved that Booker did not have lawful possession. However, the evidence would support a finding that Booker was not the one who had control over the marihuana. It was in the cab where either the defendant or Booker had access to it. There was evidence that the defendant was intending to effect its sale. The evidence would also sustain a finding of joint control."

Yet the undisputed evidence in the case was that there was not one word spoken between the defendant and Booker, and that Booker retained the bag the entire time. Here again the court's opinion is in conflict with both Landry and Perez cases, supra, and poses the question of whether the statutory presumption of guilt established by Section 4744 (a) can be relied on to convict a person not in actual possession of the drug without proving a violation by the person who does have actual possession.

The Court in the case at bar skirts the question and never really decides it squarely, but this question should be decided by the Supreme Court, because the Statutory

presumption in Section 4744.(a) is the most widely used basis for securing convictions in the prosecution of cases for possession of drugs.

(c) The Court of Appeals for the Eighth Circuit in the case at bar has sanctioned an unlawful departure from the usual and accepted course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. The Court of Appeals sanctioned the unexplained restriction of the defendant's cross-examination on a vital matter.

In the case at bar, in the last paragraph of the opinion, the Court says (Appendix, page 23):

> "The right to cross-examination is guaranteed by the Constitution and an unreasonable limitation placed on the defendant's cross-examination would require reversal."

The Court finds the fact that the defendant was not permitted to develop the information as to the whereabouts of the mysterious Mr. Booker. The facts were that the chief, critical, phase of the case circulated around Booker and his possession of the drug and his presence in the taxi, yet when the defendant's attorney tried to question the Treasury Agents as to Booker and his whereabouts the Court sustained the objections. This is stifling cross-examination at the very crucial meat of the case and if anything was prejudicial this certainly was, and the Court of Appeals sanctioned it to the defendant's prejudice.

The Court of Appeals in the penultimate paragraph of its opinion recognizes that it has some doubt and reservations as to why the defendant was restricted in his cross-examination when it says:

> " . . . The reason for sustaining the objection to questions relating to the whereabouts of Vernell

Booker and as to who had the package in the car is not that clear."

Yet these questions go to the very essence of the basis for the presumption of the guilt as fixed by the statute, being the question of possession and the nature of the connection of Mr. Booker with the Agents or with the defendant, provided we could find out where Mr. Booker was at the time of the trial and why the Government Agents were hiding this information. To say that the defendant was not prejudiced by being refused the opportunity to interrogate the United States Agents as to who Booker was, where he was, what his connection was with them and why he was not arrested or charged with "Possession" sanctions a departure from the usual course and the accepted course of judicial proceedings and should be subject to the supervisory powers of the Supreme Court.

For all of the above reasons, and to insure a fair and uniform consideration of the issues in his case, and of the conduct of the trial to which the defendant was subjected, this defendant respectfully prays the Supreme Court to issue its Writ of Certiorari and to review the decision of the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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APPENDIX.

EXHIBIT "A".

Judgment of the District Court.

From the record of the proceedings of January 25, 1963, on page 116 of the Typewritten Transcript of the Trial at line 5, we find:

> ". . . the court is now going to sentence the defendant to three years in the custody of the Attorney General of the United States, and to be placed in an institution of his selection."

EXHIBIT "B".

Judgment.

(Filed Jan. 22, 1964, Robert C. Tucker, Clerk.)

United States Court of Appeals

For the Eighth Circuit.

No. 17,257, September Term, 1963.

James Bass, Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, James Bass, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the District Court.

January 22, 1964.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

EXHIBIT "C".

United States Court of Appeals
For the Eighth Circuit.

No. 17,257.

James Bass, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 22, 1964.]

Before Van Oosterhout and Blackmun, Circuit Judges, and Hanson, District Judge.

Hanson, District Judge.

This is an appeal from a conviction in a criminal case. The defendant was charged in one Count which reads:

> "That on or about the 21st day of August, 1962, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, James Bass did unlawfully acquire from a person whose name is to the Grand Jury unknown a certain quantity of marihuana, to wit, 467 grams, 640 milligrams, more or less; he, James Bass, being a transferee required to pay the transfer tax imposed by Section 4741 (2), Title 26, United States Code, not having paid said tax imposed by said Section 4741 (a).

In violation of Section 4744 (a), Title 26, United States Code."

At the trial there was testimony that James Snokhous, a Treasury Agent, went to an apartment at 5963 Oakherst Place, St. Louis, Missouri, and arranged to have Robert Vaughn call the defendant on the telephone in an attempt to get reefer from the defendant. Later the defendant came to the apartment in a cab. Shortly thereafter the defendant was arrested and a bag containing marihuana was discovered. The cab driver, Clarence Butts, testified that the defendant asked to be taken from the corner of Sarah and St. Louis to 5963 Oakherst and that the defendant told him another man was expected. Shortly thereafter, the defendant directed the cab driver to pick up Vernell Booker at a point about one-half of a block from where the defendant got into the cab. The defendant rode in the back seat and Mr. Booker rode in the front seat with the cab driver. There was evidence that it was Mr. Booker who put the marihuana in the cab and the marihuana was found in the front seat of the cab. The defendant was arrested shortly after he arrived at 5963 Oakherst and while the cab, the driver, and Mr. Booker were still at that address. There was strong evidence that the defendant intended to sell the marihuana to James Snokhous.

The Government relied, at least in part, upon the law that proof that any person had in his possession any marihuana and failed after reasonable notice and demand to produce the required order form is presumptive evidence of guilt.

The defendant in this appeal raised the following contentions:

1. The evidence was insufficient to support a verdict of guilty. The defendant's "Motion for a Judgment of Acquittal" should have been sustained.

2. The Government failed to establish affirmatively that the marihuana in the actual possession of Booker and introduced as evidence, was contraband or illegal.

3. Proof of possession of a narcotic drug in defendant may not be established by circumstantial evidence when the undisputed direct proof establishes possession continuously in some other person (Booker).

4. The arrest of defendant was illegal, without probable cause, and without a warrant for his arrest and it was error not to sustain defendant's "Motion to Quash the Indictment."

5. The Court in error and to the prejudice of the defendant permitted the Government to elicit and introduce into evidence, hearsay and improper testimony and evidence over the objections of the defendant.

6. The Court in error and to the prejudice of the defendant restricted the defendant in his cross-examination in various aspects, preventing the defendant from eliciting relevant facts and testimony and thereby deprived the defendant of a fair trial.

It is settled law that knowledge of presence plus control over the marihuana amount to possession sufficient to raise the presumption of guilt of the defendant. **Evans v. United States**, 257 F. 2d 121; **People v. Antista**, 129 Cal. App. 2d 47, 276 F. 2d 177; **Guevara v. United States**, 242 F. 2d 745, 746. Mere proximity to the narcotic, or mere association without more with a person having control over the narcotic or mere presence on the property where the narcotic is found is not sufficient proof of possession. In applying this rule to the facts of the present case, it is clear that there is strong evidence that the defendant had knowledge of the marihuana and that the defendant was controlling it. The defendant was bringing the marihuana

or causing it to be brought to 5963 Oakherst Place to be sold. There was much more than mere proximity to the marihuana or presence in the premises where the marihauna was found. Also there was much more than mere association with Mr. Booker. There is strong evidence that the defendant either controlled Mr. Booker or that the defendant and Mr. Booker were in joint control over the marihuana. The evidence is clear that it was the defendant alone who had control over the cab by his directions given to the driver.

In **Evans v. United States**, supra, **People v. Antista**, supra, and **Arellanes v. United States**, 302 F. 2d 603, the courts held that control over the apartment or automobile where the narcotic is found is strong evidence of control over the narcotic. It does not have to be exclusive control over the premises if there is other evidence to show control over the marihuana. Other cases on this point are **Richards v. United States**, 275 F. 2d 655; **Braswell v. United States**, 200 F. 2d 597; **Manning v. United States**, 274 F. 2d 926 (This case was reversed on a different point as indicated in 280 F. 2d 422. This was done in light of **Elkins v. United States**, 364 U. S. 206, and **Rios v. United States**, 364 U. S. 253.) Power to dispose of the narcotic and power to produce the drug is evidence of control. **Arellanes v. United States**, supra; **Hernandez v. United States**, 300 F. 2d 114. The possession may be joint. **Wilson v. United States**, 218 F. 2d 754; **Gallegos v. United States**, 237 F. 2d 694.

The appellant's second contention is that Booker had actual possession of the marihuana and that the Government never proved that Booker did not have lawful possession. However, the evidence would support a finding that Booker was not the one who had the control over the marihuana. It was in the cab where either the defendant or Booker had access to it. There was evidence that the

defendant was intending to effect its sale. The evidence would also sustain a finding of joint control. Control may be received through an agent. **Wilson v. United States,** supra; **United States v. Santore,** 290 F.2d 51; **Rodella v. United States,** 286 F.2d 306; **Hernandez v. United States,** supra; **Teasley v. United States,** 292 F.2d 460. In the present case, there was considerable circumstantial evidence tending to show that Booker did not have lawful possession and this is a fact which may be established by such evidence. **Grabenheimer v. United States,** 194 F.2d 447; **Symons v. United States,** 178 F.2d 615. These cases are not factually the same as the present in that it was the defendant in those cases whose unlawful possession was established by evidence other than by refusal to produce the required documents. Nonetheless the basic issue is the same and the evidence did tend to show Booker's unlawful possession. Other cases on this issue are **Gondron v. United States,** 256 F.2d 205; **Manning v. United States,** supra.

The defendant's contention is that if there is lawful possession in Booker, there could not be unlawful possession in the defendant. In the present case, this contention is answered by the fact that there is substantial evidence that the marihuana was contraband and the possession in Booker was unlawful. The defendant cites **Griego v. United States,** 298 F.2d 845, but in the present case there is no claim that any presumption was made conclusive or that the defendant was denied the right to offer evidence to rebut any presumption. In **United States v. Mills,** 293 F.2d 609, cited by defendant, the court held there was insufficient proof of the heroin in question. The present case is factually different. The defendant cites **Perez v. United States,** 297 F.2d 12, which was reversed because of an error in the instructions. That case stands for the rule that both control and knowledge are necessary for possession.

The defendant's third contention is that where Booker was in continuous possession of the marihuana, possession of the same marihuana by the defendant may not be established by circumstantial evidence. There are many cases saying that constructive possession may be established by circumstantial evidence. **United States v. Santore**, supra; **Teasley v. United States**, supra; **Hernandez v. United States**, supra (dicta); **Williams v. United States**, 290 F.2d 451; **Rodella v. United States**, supra; **Evans v. United States**, supra; **Johnson v. United States**, 270 F.2d 721. No cases say that circumstantial evidence cannot be used to show constructive possession if its sufficiency is established. The statement in **United States v. Landry**, 257 F.2d 425, that "But no court, so far as we are aware, has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person" is an inaccurate statement if the court meant to say that constructive possession cannot be established by circumstantial evidence. Evidently, what that court meant is that when possession is solely in one person, circumstantial evidence would be insufficient to show possession in another. In the present case, there was certainly evidence to find that possession was not solely in Booker. In **Teasley v. United States**, supra, that statement in **United States v. Landry** was distinguished on that basis. **United States v. Wainer**, 170 F. 2d 603, does not stand for the proposition urged by the defendant. **Cellino v. United States**, 276 F. 2d 941, holds that constructive possession may be established by circumstantial evidence. In **United States v. Mills**, supra, the court approved the rule that constructive possession may be shown by circumstantial evidence. The rule on the weight and sufficiency of circumstantial evidence was decided by this Circuit in **Finnegan v. United States**, 204 F. 2d 105. There the court said at p. 114:

"It is strenuously urged that the guilt of the defendant rests solely on circumstantial evidence, and accordingly the rule requiring that the circumstances be not only consistent with the guilt of defendant but be inconsistent with any other reasonable theory than that of guilt and that if the circumstances are as consistent with his innocence as with his guilt, the motion for judgment of acquittal should have been granted. The rule, however, is applicable only where the evidence is wholly circumstantial and if there is any direct evidence in the case for the government which would be sufficient if believed by the jury to show defendant's guilt, then the rule as to circumstantial evidence may not be invoked."

The fourth point raised by the defendant is that the arrest of the defendant was illegal, without probable cause and without a warrant for his arrest. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed, e. g., **Cochran v. United States**, 291 F. 2d 633,

The basis for the defendant's argument is that knowledge based on statements of an informer who is not known to be reliable is not sufficient, **United States v. Smith**, 308 F. 2d 657, and that the evidence subsequently found in the taxi cab would not be sufficient. **Cochran v. United States**, supra. Even if this is correct, it does not control the present situation. However, as was shown in **United States v. Smith**, supra, where the officers have the word of an informer, even though his reliability was not proven, plus other circumstantial evidence tending to show guilt, there is probable cause for the arrest. In this case, there were sufficient other circumstances. The fact that the defendant came to 5963 Oakhurst Place shortly after the telephone call, and the call itself which the officer listened to were circumstances important in determining probable

cause. **United States v. Smith**, supra; **Spurlock v. United States**, 295 F. 2d 387. This was also a basis for the officer to find the informer reliable. See **United States v. Irby**, 304 F. 2d 280. Also the defendant's conduct when he arrived at 5963 Oakherst Place and his attempt to get away are circumstances important in determining probable cause.

The defendant's fifth contention is that the Government was permitted to elicit evidence which was hearsay and improper over the objections of the defendant. The only hearsay which the defendant has shown to have been introduced into evidence was Snokhous' statement that "Vaughn told Bass that I was the man that wanted the marihuana. He further told Bass that he, Vaughn, had the money, and that he is ready to deal. And he then asked Bass where did he have the marihuana." The objection was interposed after the answer was in. The court very shortly thereafter struck this evidence from the record. There was no error in that regard. See **Isaacs v. United States**, 301 F. 2d 706, 734.

The testimony as to the statements of the defendant were oral admissions against interest and were admissible on that basis. **Isaacs v. United States**, supra, p. 734. There would not be much question about the statements being against interest at the time made, as the defendant's statements tended to show he was guilty of a crime. See also **Segal v. United States**, 246 F. 2d 814, 818.

The court did not give the usual instruction as to oral admissions. The defendant did not submit or request such instruction, but he now raises the issue. That question was answered in **Stapleton v. United States**, 260 F. 2d 415, 419:

> "Several Government witnesses testified as to statements made by Stapleton concerning the circumstances under which he acquired possession of the stolen prop

erty. They also testified concerning offers by him to make "deals" in connection with the prosecution of this case. The trial judge did not instruct the jury that the oral admissions of a party are to be viewed with caution. Such an instruction is required in all proper cases by Title 58, Chapter 5, Section 1, A. C. L. A. 1949. Although appellant neither requested such an instruction nor objected to its omission, he now asks that we reverse his conviction on the ground of plain error under Rule 52 (b), Federal Rules of Criminal Procedure. 18 U. S. C. A.

We have carefully examined the entire record, and we are satisfied that no plain error was committed. Unlike **Stephenson v. United States**, 9 Cir., 1954, 211 F. 2d 702, this is not a case in which the appellant was connected to the offense charged solely by his own admissions. Here there were many other circumstances which tended to connect Stapleton with the theft of the property. The camp was in a secluded area; he was in that area at the time of the theft; he had knowledge of the property on the float; he made frequent calls at the float; he had the stolen goods in his possession about a month after the theft; and he later sold these goods. Under the circumstances of this case, we see no reason to relieve appellant of the consequences of his failure to raise this point at the trial stage by considering it now under the claim of plain error. **Herzog v. United States**, 9 Cir., 1956, on rehearing, 235 F. 2d 664, 666-667; original opinion, 9 Cir., 1955, 226 F. 2d 561."

See **Franano v. United States**, 311 F. 2d 533, 539; **Charles Evans v. United States**, ... F. 2d ... (8th Cir.); **Gendron v. United States**, 8 Cir., 1961, 295 F. 2d 897, 902.

The defendant also objected that the court made a prejudicial comment on the evidence. That statement is as follows:

"The Court: Just a minute, Mr. Raban. I think the witness has already testified that he was familiar with Bass, and he knew he was talking to Bass, but the other part is in relation to the corpus delicti then. That, again, I will take subject to its being established. The other portion of your objection will be overruled."

The comment was correct and did not go beyond the province and the duty of the judge. It was not prejudicial error. **Franano v. United States**, supra. See also **United States v. Redfield**, 295 F. 2d 249, affirming 197 F. S. 559, and **United States v. Epstein**, 152 F. S. 583. The defendant claims this evidence was introduced prior to the time the corpus delicti was introduced, but this is a discretionary matter with the trial court and no abuse of that discretion has been shown.

The defendant's sixth contention is that the court restricted the defendant in his cross-examination thereby depriving the defendant of a fair trial. The defendant's brief states:

"The court unlawfully sustained objections made by the government in many instances and prevented the defendant from proving to the jury and the court that the government did not have a warrant or any information from any previous reliable source upon which to base the arrest of defendant and the others in the cab or to search the cab. Also the defendant was not permitted to prove that the defendant's fingerprints were not on the bag containing the marihuana. The defendant was also not permitted to show the statement by the defendant in answer to interrogations by Federal Agents. The defendant was not permitted to prove where Vernell Booker was or if the Federal Agents knew where he was."

It is clear that as to the matter of the fingerprints the court felt it was a matter of defense and exceeded the direct examination. The reason for sustaining the objection to questions relating to the whereabouts of Vernell Booker and as to who had the package in the car is not that clear. The scope of cross-examination is largely in the discretion of the trial court and in the absence of abuse of discretion, reversal may not be had. **Segal v. United States**, supra. The discretion in this case had become operative. **J. E. Hanger, Inc., v. United States**, 160 F. 2d 8; **Lindsey v. United States**, 133 F. 2d 368.

The right to cross-examination is guaranteed by the Constitution and an unreasonable limitation placed on the defendant's cross-examination would require reversal. **United States v. Cardillo**, 316 F. 2d 606. A reasonable latitude must be given to the cross-examiner. **Kroger Grocery & Baking Co. v. Stewart**, 164 F. 2d 841. Defendants are entitled to full and complete cross-examination of government witnesses. **Gardner v. United States**, 283 F. 2d 580. Of course, an error of this type must be prejudicial to require reversal. This is perhaps the most serious question raised in this appeal, buf it is not prejudicial error. The evidence of the defendant's guilt was strong and convincing.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 858

JAMES BASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13) is reported at 326 F. 2d 884.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1964 (Pet. 12). The petition for a writ of certiorari was filed on February 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction for unlawful possession of marihuana.

2. Whether the court unduly limited cross-examination.

STATUTE INVOLVED

Section 4744(a) of the Internal Revenue Code of 1954 (as amended by the Narcotic Control Act of 1956, 70 Stat. 567) (26 U.S.C. 4744(a)) provides:

> § 4744 UNLAWFUL POSSESSION
>
> (a) *Persons in general.*
>
> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of obtaining marihuana without having paid the transfer tax imposed by the Internal Revenue Code, in violation of 26 U.S.C. 4744(a) (R. 109). He was sentenced to imprisonment for three years (Pet. 11).

The government's evidence showed that Robert Vaughn, in the presence of federal agent Snokhous (who arrested Vaughn), telephoned petitioner on August 21, 1962 from an apartment at 5963 Oakherst Place in St. Louis that he was ready to get the "pound of reefer" about which he had called earlier. Petitioner answered that it would take him 15 or 20 minutes to get there (R. 47–55). As Vaughn and Snokhous left the apartment building, petitioner arrived at the entrance (R. 8–11). There Vaughn told petitioner that Snokhous was the man who wanted the marihuana, that he had the money and was ready to "deal" (R. 42). Petitioner said that he did not have the "weed" with him and that he wanted to talk with Vaughn in private. After stepping aside with Vaughn for a minute, petitioner told Snokhous that he could obtain the marihuana and would return in thirty minutes. As petitioner entered the rear of a waiting taxicab, he was arrested. On the front seat of the cab, between the driver and one Vernell Booker, was a brown paper bag containing roughly a half pound of marihuana. Petitioner, when asked if he had the order form required by the Internal Revenue Act, answered in the negative (R. 13–22).

The cab driver who brought petitioner to the Oakherst address testified that on that night petitioner entered the rear seat of his cab at Sarah and St. Louis Streets and asked to be taken to 5963 Oakherst. He said, however, that he was expecting someone else and asked the driver to wait for a minute. Petitioner then instructed the driver to make a U-turn and to

stop at an alley a half block away. A man, later identified as Vernell Booker, came from the alley carrying a brown bag, entered the front seat of the cab and placed the bag on the seat between himself and the driver. Petitioner then instructed the driver to proceed to the Oakherst address. The driver did so, stopping once en route to pick up a woman passenger bound for another destination who sat in the rear seat with petitioner. At the Oakherst address petitioner asked the driver to wait for a minute while he alighted. Officers halted the cab as petitioner sought to reenter (R. 66–74).

ARGUMENT

1. Both courts below properly found that the evidence was sufficient to sustain petitioner's conviction of unlawful possession of marihuana within the meaning of 26 U.S.C. 4744(a). Possession may be proved by showing dominion and control over the narcotics. *United States* v. *Pisano,* 193 F. 2d 355 (C.A. 7). Here, it was petitioner who promised delivery and fixed the time. It was he who instructed the driver of the taxicab to wait for Booker who brought the narcotics. Once the marihuana had been placed in the car by Booker, it was petitioner who directed the driver to proceed to the point where he had promised delivery. Whatever Booker's relationship to petitioner, the evidence shows that petitioner had and exercised the authority to control the narcotics which Booker brought into the taxi.

There is thus no merit to the contention that Booker's possession of the marihuana precluded proof

of possession of the same marihuana by petitioner. As the court below pointed out, the dominion and control necessary to show possession may be established by circumstantial evidence even where another person has actual physical custody.[1] See *Teasley* v. *United States*, 292 F. 2d 460 (C.A. 9); *United States* v. *Santore*, 290 F. 2d 51 (C.A. 2), certiorari denied, 365 U.S. 834; *Evans* v. *United States*, 257 F. 2d 121 (C.A. 9), certiorari denied, 358 U.S. 866.[2]

2. On cross-examination agent Snokhous was asked about the circumstances of petitioner's arrest. In answer to questions by the defense, the agent said he had not known either the cab driver or Booker before that night (R. 35). He explained that their names were ascertained by other agents at the time of peti-

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[1] It follows, of course, that Booker's possession of the required order form would not aid petitioner. Even if Booker and petitioner could be deemed in joint possession, petitioner's own failure to produce the required form would bring the statutory presumption of guilt into operation as against him. See Section 4744(a), p. 2 *supra*; *United States* v. *Oropeza*, 275 F. 2d 558 (C.A. 7). *Perez* v. *United States*, 297 F. 2d 12 (C.A. 5), relied upon by petitioner, is inapposite, for in that case there was no evidence that either of two defendants found in possession of marihuana had failed to produce an order form. See 297 F. 2d at 14.

[2] In *United States* v. *Landry*, 257 F. 2d 425, the Seventh Circuit held that possession was not proved when the undisputed evidence showed that possession was in another person who said she was keeping the narcotics for him because, if she gave it to him, he would use it all at once. The same court has distinguished *Landry* in other cases on the ground that there "control was expressly negatived". *United States* v. *Davis*, 281 F. 2d 93, reversed on other grounds, 364 U.S. 505; *United States* v. *Taylor*, 266 F. 2d 310, certiorari denied, 361 U.S. 853.

tioner's arrest (R. 35–36). The court sustained objections to questions as to whether Snokhous knew the whereabouts of Booker, whether he obtained Booker's address when he learned his name and whether he revealed Booker's identity to petitioner or counsel prior to trial (R. 40).

These rulings were well within the scope of the trial court's discretion to control cross-examination. Booker was not in the government's control; petitioner himself states that Booker was not arrested (Pet. 5). If Booker was anyone's agent, he was petitioner's. Hence, questions to the agent as to Booker's whereabouts had no bearing on any possible issue in the case. No claim was made that petitioner sought the production of Booker as a witness or needed the government's help to obtain him.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964